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THE INTERSTATE COMMERCE CLAUSE AND NRA

By MAURICE M. FEUERLICHT, JR.*

The NIRA¹ is neither good nor bad; neither constitutional nor otherwise, until the Supreme Court passes judgment on the question of whether Congress has stepped over Constitutional bounds in passing the act. There is no word in the Constitution referring to NIRA, hidden away by the not completely omniscient Fathers. Yet, under our scheme of government, nine men will delve and seek, and follow devious paths, until like the verb of a German sentence, they emerge unexpectedly miles away with an illuminating formula which clearly indicates that the Fathers either did or did not intend that our national government should have power to attempt to solve one of the most perplexing and appalling problems in its history.

The present writer is no prophet, and no one other than a prophet can foretell the decision of the Supreme Court. It is impossible and undesirable to base a prognosis on the narrow foundations of legalistic reasoning, when dealing with a situation belonging more properly in the field of social philosophy, which takes only that conceived to be the best in the past, affording a firmer foundation for the future. It can be pointed out that many years ago the Court chose the wrong turn in its labyrinthine legal peregrinations and emerged to give us a Dred Scott decision—remembered chiefly because of the great Civil War to which it led. Or it might be recalled that a decision of the Supreme Court invalidated the Income Tax laws and ignored the pressing national need for them, so the 16th Amendment was passed, nullifying the action of the Court.

But accuracy is not achieved by guessing; any argument as to what the decision will be, is purely academic; any argument as

* Editor, Illinois Law Review.

¹ Pub. No. 67, 73rd Cong. approved June 16, 1933. U. S. C. A. Cum. Supp. July, 1933., pp. 5-19.

to what it ought to be, is not controlling. The present purpose is to point out what the decision can be, if the Court, for reasons beyond our ken at present, desires so to hold.

The objectives and administrative features of the NIRA have been so thoroughly discussed and publicised that it would be repetitious and superfluous to cite the purposes of the act as stated in its opening sections. It is sufficient, to recall that Congress legislated extensively over commerce, under the Commerce clause of the Constitution which gives it power to regulate "Commerce among the several states, with foreign countries, and with the Indian tribes." Sections 3 and 4 of the Act refer only to "commerce," without any limitations and to "transactions in or affecting interstate commerce."

The question is, "How far may Congress go, under the Commerce clause, in regulating the commerce of a nation, to effectuate the purposes of the Act?"

It is clear that Congress may regulate railroads and goods which travel from one state to another. But the administration of NRA seeks to touch barber shops, restaurants, department stores, and all kinds of activities, local, interstate, intrastate, and parts of interstate activities not in interstate commerce. Is there any legal sanction for this?

It is settled by a long line of decisions that where intrastate commerce affects interstate commerce, Congress may legislate over the former in order to effectuate its regulations over the latter. Mr. Justice Hughes, in the *Shreveport Case*,² cites many precedents, including the *Second Employer's Liability Cases*,³ *Interstate C. C. v. Goodrich Transit Co.*,⁴ and the *Minnesota Rate Cases*,⁵ and (P. 353) speaking of the decisions, says, "they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used

² *Houston, E. & W. T. R. Co. v. U. S.*, 234 U. S. 342, 34 Sup. Ct. 833 (1914).

³ *Second Employer's Liability Act*, 35 Stat. 65, c. 149; *Second Employer's Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169 (1912).

⁴ *Interstate C. C. v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436 (1912).

⁵ *Minnesota Rate Cases: Perkins v. Northern Pacific Railway Co.*, 155 F. 445 (1907); *Shephard v. Northern Pacific Railway Co.*, 184 F. 765 (1911), decree modified; *Simpson v. Shephard*, 230 U. S. 352, 33 Sup. Ct. 729 (1913).

in their intrastate operations to the injury of Interstate Commerce." The Shreveport Case held that Congress has no power over local railway rates—yet where such rates work a discrimination against interstate commerce or place a burden on it, Congress may legislate to remove that discrimination or burden. Mr. Justice Hughes stated that, "The power of Congress extends to the maintenance of conditions under which interstate commerce may be conducted upon fair terms." And so hold the Wisconsin Rate Cases.⁶ Merely because the question of the extent of the applicability of the interstate commerce clause has occasion to arise most frequently in connection with railroads, there is no justification for assuming that the power of Congress to legislate over intra-state activities in the guise of protecting or removing burdens, is limited to that field. From the earliest case construing this clause of the Constitution, *Gibbons v. Ogden*,⁷ to the *Lottery Cases*⁸ and the *Northern Securities Case*,⁹ the definition that the clause takes in every species of commercial intercourse, has been repeatedly recognized, and the only question dividing the judges has been the application of this definition. In *County of Mobile v. Kimball*,¹⁰ the court said, "The commerce power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted . . ."; and in *Texas & N. O. R. v. Brotherhood of Ry. and S. S. Clerks*,¹¹ Hughes, C. J., stated (P. 570), "The authority to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement,'¹² to adopt measures 'to promote its growth and insure its safety,'¹³ to foster, protect, control and restrain."¹⁴

The Court has made use of all these and several other formulae, for getting many forms of intra-state activity under Congressional jurisdiction. The pertinent question is, "How far can

⁶ *Railway Commission of Wisconsin et al. v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 42 Sup. Ct. 232 (1922).

⁷ 9 Wheat. 1 (1824).

⁸ *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1903); *Francis v. U. S.*, 188 U. S. 375, 23 Sup. Ct. 334 (1903).

⁹ *Northern Securities Cases*, 193 U. S. 197, 24 Sup. Ct. 436 (1904).

¹⁰ 102 U. S. 691, 697 (1880).

¹¹ 281 U. S. 548, 50 Sup. Ct. 422 (1930).

¹² *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999 (1870).

¹³ *Supra* note 10.

¹⁴ *Supra* note 3.

Congress go under the guise of aiding interstate commerce?" It will be noted that in all the cases hereafter cited, the Court has used a formula when it desired to extend the field.

May the power of Congress to regulate Interstate Commerce, include price fixing, restriction of production, the setting of wages and hours? These are within the field of private enterprise, with the exception of cases which are affected with the public interest, or when the purpose of the legislation is as set forth in one of the formulae to which the Court resorts. But "public interest," "burdens on Interstate Commerce," "fostering and protecting" are all formulae to permit the Court to frown or smile on Congress.¹⁵

In trying to find out how far the Court has gone or will go in defining what shall come within the permissive formulae, it may be stated that the justices have been erratic in the extreme. The Supreme Court on one occasion will assert that the national power over interstate commerce is exclusive, permitting Congress no obstacles in protecting it, and almost with the same breath the Court concedes that a state may legislate in effect on interstate commerce. In *Helson v. Kentucky*¹⁶ Mr. Justice Sutherland said, "Regulations of interstate and foreign commerce is a matter committed exclusively to the control of Congress," while in *St. Louis, Santa Fe Ry. v. Public Service Commission*¹⁷ Mr. Justice McKenna said, "The primary principle is that although interstate commerce is outside of regulation by a state, there may be instances in which a state, in the exercise of a necessary power, may affect that commerce."

One who mines company coal to be used to feed an engine to be used in hauling interstate commerce freight is not employed in interstate commerce, according to *Delaware, Lackawanna & W. Ry. v. Yurkonis*,¹⁸ and yet the Court holds that one who cooks food which is fed to workmen employed in repairing a bridge within a state, on an interstate railway, is employed in interstate commerce.¹⁹ To cite further seeming paradoxes, in *Paul v.*

¹⁵ See Gavitt, "The Commerce Clause" (Principia Press, 1932). The opening chapters of this valuable treatise develops the thesis fully.

¹⁶ 279 U. S. 245, 49 Sup. Ct. 279 (1929).

¹⁷ 261 U. S. 369, 43 Sup. Ct. 380 (1923).

¹⁸ 238 U. S. 439, 35 Sup. Ct. 902 (1915).

¹⁹ *Philadelphia, B. & W. Railway v. Smith*, 250 U. S. 101, 39 Sup. Ct. 396 (1919).

Virginia²⁰ soliciting of insurance was held not to be interstate commerce, while the soliciting of advertising is interstate commerce, in *Ramsey Co. v. Associated Bill-Posters*.²¹

And finally, consider the quixotic history of the Grain Futures Trading Act. The first Act²² was held unconstitutional in *Hill v. Wallace*.²³ The Act sought to regulate Boards of Trade not within the direct terms of the Act by taxing the sale of grain futures twenty cents a bushel, and this was held invalid, as applying to intrastate commerce. A subsequent Act²⁴ was upheld in *Board of Trade v. Olsen*.²⁵ There, Congress limited the Act to interstate commerce, but defined the term to include what in the first Act had been called intra-state sales.

Since opponents of NIRA will, and can cite cases indicating that the Act takes in too much ground, extensive mention is being made, of cases both pro and con, to show that in fact, the many decisions on both sides do not force the Court, in its reverence for stare decisis, to hold either way—unless a common denominator can be found.

After the *Employer's Liability Cases*, Mr. Justice Holmes evidently took a backward glance at the precedents before handing down an opinion in *Galveston, Houston, etc. Ry. v. Texas*²⁶ for in deciding that not every regulation in fact is a regulation in law, the learned justice said, "Not every law that affects commerce among the states is a regulation of it in the constitutional sense," which is just an American way of saying that the Court often speaks of regulation of commerce in its "Pickwickian sense."

Professor Gavit, in "The Commerce Clause and the Constitution,"²⁷ section 2, states that the interpretations of the commerce powers of Congress by the Supreme Court, fall into nine different formulae, which shade into each other in a highly confusing manner. In *Gibbons v. Ogden*²⁸ it is stated that the National

²⁰ 8 Wall, 168 (1869).

²¹ 260 U. S. 501, 43 Sup. Ct. 167 (1923).

²² First Grain Futures Act: Act of August 24, 1921, 42 Stat. 187, c. 86.

²³ 259 U. S. 44, 42 Sup. Ct. 453 (1922).

²⁴ Second Grain Futures Act: Act of September 21, 1922, 42 Stat. 998, c. 369.

²⁵ 262 U. S. 1, 43 Sup. Ct. 470 (1923).

²⁶ 210 U. S. 217, 28 Sup. Ct. 638 (1908).

²⁷ *Supra* note 15.

²⁸ *Supra* note 7.

power over interstate commerce is exclusive. In *Cooley v. Bd. of Wardens*²⁹ it is sometimes exclusive and sometimes not exclusive, depending on: (a) whether or not the subject matter calls for uniform regulation, or (b) it calls for local regulation. In another group of cases the national power is nevertheless exclusive even if it does call for local regulation, but Congress has however made a uniform rule, or "so occupied the field," that what was local is now national.³⁰

It is unnecessary to mention all these dicta of the Court to bring out the fact that anybody may cite cases seeming to prove the particular contention of the orator, with reference to congressional powers over state activity. It is evident that a mere citation of precedents will lead to no conclusion, other than that the cases indicate more and more about less and less.

However, there are certain outstanding instances where the Court by the use of one or another of its permissive formulae, has extended commercial regulation by Congress, into fields of intra-state activity.

In *Southern R. v. U. S.*³¹ the Federal Safety Appliance Act³² was upheld. This Act applies to every interstate commerce carrier by railroad, whether at the time, the carrier is engaged in interstate or intrastate transportation, and it applies to equipment used solely in intrastate transportation.

In the Lottery Cases,³³ the White Slave Cases,³⁴ and the Liquor Cases,³⁵ the Court held that it was constitutional for Congress to pass the legislation questioned in these cases, under its commerce powers, though obviously the real justification for it lies entirely outside the field of interstate commerce. The real purpose of this legislation was to protect individuals within the limits of each state, who in no sense of the word are engaged or

²⁹ 12 How. 299, 13 L. Ed. 996 (1851).

³⁰ *Northern Pacific Railway Co. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160 (1912).

³¹ 222 U. S. 20, 32 Sup. Ct. 2 (1911).

³² Federal Safety Appliance Act: Act of March 2, 1893, as amended April 1, 1896, 27 Stat. 531, 29 Stat. 85. March 2, 1903, 32 Stat. 943. Congress may prescribe the kind and condition of the material instruments with which commerce shall be done. The validity of this Act and the powers created under it, has never been questioned. *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1; *Schlemmer v. B. R. & P. Ry. Co.*, 205 U. S. 1.

³³ *Supra* note 8.

³⁴ *Hope v. U. S.*, 227 U. S. 308, 33 Sup. Ct. 281 (1913).

³⁵ *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865 (1891).

legally interested in interstate commerce. The same is true of the Courts' upholding the Drug Act³⁶ and similar legislation. Clearly the Court recognized grounds of social policy in deciding the cases. And herein rests part of the secret of the decision in the case of *Hammer v. Dagenhart*,³⁷ that rock of Gibraltar to which the opponents of NRA cling tenaciously. In that case, the social policy involved was not so strongly apparent to the Court. There is a difference between deadly drugs and children working.

With further reference to the Child Labor Case, other matters may be pointed out. In *Hammer v. Dagenhart* the Court overruled an act prohibiting transportation in interstate commerce of any products manufactured by the labor of children under a certain age. The Court held, distinguishing the Lottery and other cases, that Congress was endeavoring to prohibit an activity within a state through its interstate commerce powers. Humorously enough, the Court declared that Congress "may not do indirectly that which it cannot do directly."

While this case, which was decided by a 5 to 4 decision, held that the commerce clause may not be used as a mere device to force local regulations on state manufacturing, it also holds that if the regulation of commerce is the main purpose of Congress, manufacturing may be regulated as an incident to the use of the larger power. The NRA codes stamp out Child Labor, but there is no one so rash as to maintain that such was the ultimate purpose of the NRA.

Let us picture a child making a basket in a factory in Chicago. The basket is put on a train en route for New York, and just outside of Chicago but still in Illinois, the train passes over a bridge. Under the bridge a section crew (still in Illinois) is strengthening the stanchions of the bridge. Off in a corner of the field is a man who cooks dinner for the crew of repair men. Under *Hammer v. Dagenhart*, the child making the basket which is put directly on the train, is not engaged in interstate commerce. Neither is the factory in which the child works. But as soon as the basket gets on the train, even before it leaves the state (and if it never gets out of the state) the basket and the train become a part of interstate commerce. The bridge in Illi-

³⁶ Upheld in *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431 (1913).

³⁷ 247 U. S. 251, 38 Sup. Ct. 529 (1918).

nois, being part of an interstate railway, is in interstate commerce. The workers are in interstate commerce. And so is the cook who sits by his pots and pans. (This would no doubt surprise the cook!) Now, if the child is not in interstate commerce (and he starts this whole mechanism), how reconcile the Child Labor decision with that given by the Court a year later, saying that the cook, who never comes near the train or the basket, is in interstate commerce?³⁸ Furthermore, the cook is an adult, and the child is immature. Can it be that age decides participation in interstate commerce?

In addition to railroads and state manufacturing, we find in agricultural fields abundant examples of the use of judicial formulae. The Grain Standards Act was upheld, on the ground that it protects the buyer and seller of grain (though they are not engaged in interstate commerce).³⁹ Under the NRA, labor standards may be set up because they protect the worker, and he is not necessarily engaged in interstate commerce. Is protection more desirable in one case than in the other? The case of *Shafer v. Farmers' Grain Co.*⁴⁰ upheld the Federal regulation of grain elevators on the ground of their being engaged in interstate commerce, but the real reason was for protection. Could anything be more fixed and local than grain elevators? If they dispense grain to other states, is it not logical to point out that department stores buy their thousands of articles of merchandise from every corner of the globe?

Consider next the Packers and Stockyards Act.⁴¹ This regulated the charges of commission men in stockyards. It was upheld in *Stafford v. Wallace*, and *Tagg Bros. v. U. S.*⁴² If Congress can regulate these charges, may it not regulate other prices? In the opinion of *Stafford v. Wallace*, the Court quotes White, C. J., in *United States v. Ferger*.⁴³

Refuting the argument that the practices condemned in this decision are not interstate commerce, the Court said: "But this

³⁸ Supra note 19.

³⁹ *Merchants Exchange v. Missouri*, 248 U. S. 365, 39 Sup. Ct. 114 (1919).

⁴⁰ 268 U. S. 189, 45 Sup. Ct. 481 (1925).

⁴¹ 42 Stat. 481.

⁴² 258 U. S. 495, 42 Sup. Ct. 397 (1922); 280 U. S. 420, 50 Sup. Ct. 220 (1930).

⁴³ 250 U. S. 199, 39 Sup. Ct. 447 (1919) (validity of an Act of Congress punishing forgery and the utterance of bill of lading).

mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it. We say, 'mistakenly assumes,' because we think it clear that if the proposition were sustained (i. e.—that this activity is not in interstate commerce) it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce and with a host of other acts which because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves." In the Solicitor-General's brief, he maintained that since Congress legislated on a vast and vital subject and all of its ramifications as an entirety, the judicial review should go on lines no less extensive.⁴⁴ He further pointed out that the question here is not whether commission merchants and dealers should be included within the Act by judicial interpretation, as in *Hopkins v. U. S.*,⁴⁵ but whether Congress had the power to designate them and their transactions as a part of the "current of commerce" and as such within the Act. In *Hopkins v. U. S.* (P. 597), the Court said, "—the term commerce is one of very large significance, comprehending intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted."⁴⁶ If we recognize that citizens of one state buy hair-nets at Marshall Field's in Chicago, and those hair-nets were bought by Field's from a New York concern, it is certain that department stores can be affected and covered by Congress under *Stafford v. Wallace*, if indeed, sole reliance need be placed on that case. The opinion, by that ardent conservative, Chief Justice Taft, brings to light further points of interest. "It was for Congress to decide, from its general information and from such special evi-

⁴⁴ *United States v. Brigantine William*, District Court of Massachusetts (1808).

⁴⁵ 171 U. S. 578, 19 Sup. Ct. 40 (1895).

⁴⁶ *Welton v. Missouri*, 91 U. S. 275 (1875). *County of Mobile v. Kimball*, *supra* note 10. *Gloucester Ferry Co. v. Com. of Penn.*, 114 U. S. 196, 5 Sup. Ct. 826 (1885). *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207 (1894).

dence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the Act in order to determine its validity, to know the conditions under which Congress acted." The Chief Justice then quoted the *Swift Case*.⁴⁷ "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." And in concluding, he stated, "The application of the commerce clause of the Constitution in the *Swift Case* was the result of the natural development of interstate commerce under modern conditions. * * * This Court declines to defeat this purpose in respect of such a stream of commerce, and take it out of complete national regulation by a nice and technical inquiry into the now interstate character of some of its necessary incidents and facilities when considered alone and without reference to their associations with the movement of which they were an essential but subordinate part."

A very important case, having a definite bearing on this discussion, is *Board of Trade of the City of Chicago v. Olsen*,⁴⁸ in which case the Court upheld the validity of the Grain Futures Act. The Court there held, after citing *United States v. Pat-ten*,⁴⁹ that "By reason and authority, therefore, in determining the validity of this Act, we are prevented from questioning the conclusions of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the states in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the approximate means adopted in this act by which this abuse may be restrained and avoided."

But, it may be said, this deals with a deliberate tampering by an organized group, and such is not the case when one speaks of a depression. In reply it may be pointed out that the effect is the same, whether a small group of men by the use of monopolistic practices, hinder and obstruct commerce, or whether, at the other extreme, men compete in such deadly fashion as to glut the market, cause overproduction, falling prices, lower

⁴⁷ *Swift and Company v. U. S.*, 190 U. S. 375, 25 Sup. Ct. 276 (1905).

⁴⁸ *Supra* note 25.

⁴⁹ 226 U. S. 525, 33 Sup. Ct. 141 (1913).

wages, decreased earning and buying power, and all the attendant evils of a depression. The effect on commerce is the same. Can it be said that Congress has the power to curb one means of injuring interstate commerce, and not the other? It is not the means of hindering commerce, over which Congress has power—it is the result, the end achieved—the evil! The hindering of commerce is the result, and it cannot now be denied that when such is the case, Congress can legislate. Congress is interested in and has power over causes and effects, not merely over roads taken. If Congress can legislate on the instrumentality causing evils at one end of the economic scheme, may it not legislate against the instrumentalities causing the same evils at the other end? The power is there for the one, if for the other, and whether the hindrance to commerce is monopoly or depression, Congress may move equally to preserve the economic principles upon which our government is based and has grown.

The courts have recognized that there is a definite connection between depression of local businesses and interstate commerce. In *Calistan Packers, Inc. v. U. S.*⁵⁰ a peach packing concern was allotted a certain quota of its product to be shipped into other states. This quota was set after a hearing in which every similar company had its "day in court" and an equitable quota had been set for all—quotas enabling the demands of the market to be satisfied, the shippers to make profit, and which prevented prices from falling. The Calistan Packers tried to get around their allotment set by the AAA (the agricultural companion of NRA) by shipping an additional 150,000 crates of peaches within the state of California. In holding that this had an effect on interstate commerce, and that Congress could therefore regulate the activity, Federal District Judge, St. Sure, said: "In the cling peach industry and in other industries, due to great overproduction and ruinous competition, the members of that industry and the trade and commerce thereof have been near the point of ruination. In particular, due to the foregoing factors and to the great disparity between the prices of commodities purchased by the farmers and the prices they have received for their own products, the farmers have been reduced to a condition bordering upon economic servitude. In the past few years the price for their peaches has been precipitously reduced from around \$20 a ton to as low as \$6.50 a ton. Overproduction and

⁵⁰ 4 Fed. Supp. 660 (1933).

glutted markets travel hand in hand with ruthless competition. It is needless to point out that the welfare of the nation has been seriously handicapped by these conditions, and the country's trade and commerce has been vitally affected."

And finally, only passing mention need be made of at least two more pertinent cases. In *Baltimore & Ohio Ry. v. I. C. C.*,⁵¹ the Supreme Court upheld the Federal Hours of Labor Act, on the basis of the interstate commerce power; and in *Wilson v. New*,⁵² an act temporarily fixing wages and hours of service in order to prevent a strike, was held valid.

From even a hasty and superficial glance at the cases, we can draw a clear meaning from the words of Chief Justice Hughes and the formula he used in *Appalachian Coals, Inc. v. U. S.*,⁵³ where he said, "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."

It has been stated that there are many and seemingly contradictory cases both for and against a decision favoring the powers under the NIRA, and that there are possibly certain common denominators which might well tend to cause the Court to look with particular favor upon decisions such as have just been discussed. One of those strong denominators has been the oft enunciated reluctance of the Court to set itself up as a super-legislature to overruling definitions in acts of Congress, by which it marks the extent of its own power. This raises two closely related points: first, the reluctance of the Court to overrule a definition of Congress, and second, the power of Congress to define the catch-all clauses in the Constitution. Since Congress, through the NRA, has defined in effect that which shall be deemed as affecting interstate commerce, both of these considerations carry great weight in the present discussion.

That the Court will hesitate before it overrules an Act of Congress, is indicated in *Stafford v. Wallace*, and other cases previously cited. Chief Justice Taft stated boldly in his opinion that where Congress has means of determining the actual conditions in the nation and then concludes that a use of its powers is justified by circumstances, the Court will if at all possible,

⁵¹ 221 U. S. 612, 31 Sup. Ct. 621 (1911).

⁵² 243 U. S. 332, 37 Sup. Ct. 298 (1916).

⁵³ 288 U. S. 344, 53 Sup. Ct. 471 (1933).

give full effect to Congressional legislation. This is in keeping with our best judicial tradition, and finds its root in a statement by the venerated Chief Justice Marshall, in *McCulloch v. Maryland*.⁵⁴ There, discussing the nature and extent of the implied powers of Congress under the "necessary and proper" Clause of Art. I of the Constitution, he said, "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

This principle of judicial non-interference has been applied to the present situation, and has been most aptly expressed with reference to the AAA, in the *Calistan Packer's Case*. "The power to regulate interstate commerce is granted in broad terms to the National Congress and this power should not be restrictively construed. Rather it must be construed to give the Congress the power to regulate any and all commerce which may seriously affect the interstate trade. This court, with propriety, cannot make the narrow holding that the legislative body, under this and analogous statutes, is without power to regulate intrastate commerce as a proper means of achieving the desired regulation of interstate commerce. In this and other respects this power to regulate must be construed to effectuate the broad purposes of the Constitutional grant and of the national policy."

And in *Fletcher v. Peck*,⁵⁵ Mr. Chief Justice Marshall again pointed out that the question as to whether a law is void because of repugnancy to the Constitution, is always a question of great delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. Marshall concludes, "The opposition between the law and the Constitution should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

In *United States v. United Shoe Machinery Co.*,⁵⁶ the Court held that a Federal statute will not be declared void by the courts unless it appears beyond a reasonable doubt that it is not within the Constitutional power of Congress. And the Court so

⁵⁴ 4 Wheat. 316 (1819).

⁵⁵ 6 Cranch. 87 (1810).

⁵⁶ 234 Fed. 127 (1916).

held, knowing that its decision made possible one of the strongest, most iron clad monopolies that has ever existed in this country.

There are many cases which have held with uniformity that if the meaning of the Constitution is doubtful or vague, a legislative construction will be given serious consideration by the courts.⁵⁷ This serious consideration will be given, both as a matter of policy, as was stated in the *Levin* case, and also, as was stated in *Stuart v. Laird*,⁵⁸ because the meaning given by Congress may be presumed to represent the true intent of the Constitution.

Since the courts do hesitate to step across the bounds of our tripartate governmental system and act as a check on the Congress, it is proper to consider just who has the power to define the term "commerce." How far Congress has gone in the use of this self-delegated power has been indicated, but the question now is, has Congress the power to define in its own terms the jurisdiction given it by the Constitution? In other words, if Congress says that barber shops, department stores, minimum wages and hours of labor, affect interstate commerce and thus come within the purview of Congress, is Congress taking an unprecedented step and usurping judicial powers in acting upon them?

The power to define the substantive grants of power contained in the Constitution belongs to the legislative department, and the courts have only the power to determine whether the limitations and prohibitions prescribed by Congress, have been observed.⁵⁹

Compare some other grants of power in the Constitution in order to learn the limits of Congressional authority, under the grant of power to regulate commerce. Consider first the definitive powers of Congress under the taxation clauses. By Art. I, sec. 8, Congress is empowered to "lay and collect taxes, duties,

⁵⁷ *The Genessee Chief v. Fitzhugh*, 12 How. 443 (1851). *Cooley v. Philadelphia Board of Wardens*, supra note 29. *West River Bridge Co. v. Dix*, 6 How. 507 (1847). *Briscoe v. Kentucky Bank*, 11 Pet. 257, 9 L. Ed. 709 (1837). *McCulloch v. Maryland*, supra note 54. *Levin v. U. S.* 128 Fed. 826 (1904).

⁵⁸ 1 Cranch 299 (1803).

⁵⁹ This is pointed out, with numerous citations, in "The Regulation of Commerce" (1917), by Calvert. P. 25.

imposts and excises, to pay debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The Court has in its power the authority to define in any given case whether the constitutional requirements of apportionment in Sec. 2 of Art. I, sec. 8, have been observed in the levy of such a tax, and whether in the levy of duties, imposts and excises, the prescribed rules of uniformity, which is one of limitation, has been obeyed. But aside from this, the right of Congress to tax within its delegated powers, being unrestrained (except as limited by other parts of the Constitution), it is within the authority conferred on Congress to select the objects upon which an excise should be laid.⁶⁰ The only other limitation is that operations of a state government cannot be considered the proper subject of Federal taxation.⁶¹

Therefore, the Court can only check legislation with the substantive law of the Constitution and with other parts of the Constitution prohibiting acts. But since Congress may collect taxes, it is for Congress to determine whom to tax, and its decision is not open to question except within the indicated limits.

If this does not appear sufficiently spectacular as judicial legerdemain, consider Art. 4, section 4, of the Constitution, which guarantees a republican form of government to the states. The power to determine this is merely given to the United States. It would seem that this is patently a judicial question, to decide what is the established government in a state and whether it is republican in form.

However, in *Luther v. Borden*,⁶² Chief Justice Taney stated "Under this article of the Constitution it rests with Congress to decide what form of government is the established one in a state. For as the United States guarantees to each state a republican government, Congress must necessarily decide what government is established before it can determine whether it is republican or not." Can Congress actually have the power to define the government of a state itself as coming under the Constitution, and not have the power of defining what commerce in a

⁶⁰ *McCray v. U. S.*, 195 U. S. 27, 24 Sup. Ct. 769 (1904).

⁶¹ *State Tax Certificates, etc. Borden v. Columbia County*, 33 Wis. 445 (1873).

⁶² 7 How. 1 (1849).

state affects interstate commerce under the Constitution? In the *Luther v. Borden* Case the Court held that the decision by Congress concerning the existence of republican statehood was a recognition by the proper Constitutional authority, and its decision is binding on every other department of government, and may not be questioned in a judicial tribunal. That the opinion was further borne out in *Texas v. White*,⁶³ indicates that the decision was not a peculiar one.

As a final example of the extensive powers of Congress to define, attention is drawn to the field of the judiciary itself, where in Congress has certain powers to define what is a case in equity.

Art. III, section 2, raises the question as to the power of Congress to determine to what extent, and in what manner the powers granted, shall be exercised. This section provides that the judicial power shall extend "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." There is good and persuasive reason to believe that under this, Congress has power to define a case in equity and to declare what is or is not a case of equitable cognizance.

The question has arisen on the application of Sec. 914 of the Revised Statutes of the United States.⁶⁴ "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District courts, shall conform, as near as may be, to the practice, pleadings, and modes and forms of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held—any rule of court to the contrary notwithstanding."

In *Briggs v. United Shoe Machinery Co.*,⁶⁵ and *Noonan v. Lee*,⁶⁶ the Court held that the general power of the Federal courts when sitting as courts of equity, can be exerted only in cases otherwise within the jurisdiction of those courts, as defined by Congress.

And finally, in a CCA case, *Smith v. American National Bank*,⁶⁷ Mr. Justice Brewer emphasized the fact that Congress

⁶³ 7 Wall. 700 (1868).

⁶⁴ 28 U. S. C. A., sec. 723.

⁶⁵ 239 U. S. 48, 36 Sup. Ct. 6 (1915).

⁶⁶ 2 Black 499.

⁶⁷ 89 Fed. Rep. 832 (1898).

undoubtedly has the power to define what should be a case in equity. Justice Brewer states— “* * * and there can be no doubt that, when so declared, that declaration is obligatory upon the Federal courts by superadding the authority of the legislative department of the government to that of the common law, so as not to leave the line of separation discretionary with the judges.”⁶⁸

Reviewing the dividing line between Congress and the Supreme Court, in the field of taxation, in the power to define a republican form of government, and the power to define a case in equity, there is but one inevitable conclusion: Once the Constitution has been interpreted by Congress, the Court will not tamper, but where Congress invades a field protected by the Constitution, as beyond the field wherein Congress may define powers, then the Court overrules it. In short, the Court has jurisdiction over the Constitution, not Congress.

It is clear that the Supreme Court will overrule Congress only with reluctance (out of the 38,000 cases decided by the Court in its history, only about 60 Acts of Congress have been held invalid)—and the power of Congress to define its own powers based on other sections of the Constitution has also been shown, so it should be apparent that if Congress has the primary power to define interstate commerce to suit changing conditions and evolving principles, there is then nothing forced or artificial or particularly novel in the argument.

When the power of Congress to define the term “commerce” is referred to, of course it is not meant that any attempt would be made by Congress to give a statutory definition to the word, but that when Congress legislates on a particular subject (such as the NRA), under the grant of power to regulate commerce, it thereby, in effect, gives a partial definition to the term as including the particular subject-matter of the statute.

It is not questioned that to determine the operation of Constitutional limitations, and in so doing, to define the terms used, is one of the functions of the courts. The point is that the primary power to define rests with Congress, and the courts will not readily overthrow such a definition.

The term “commerce” is without juridical significance, and is therefore, unlike “trial by jury,” “law and equity,” “admiralty

⁶⁸ See also Mr. Justice Curtis in *Neves v. Scott*, 13 How. 268 (1851).

and maritime," "habeas corpus," "ex post facto," and "duty of tonnage." These are all well understood words and have a very clear meaning in our system of jurisprudence.

If it could be supposed that Congress would pass a law on a subject which, under any accepted definition or meaning of the word, had no relation to commerce, it would undoubtedly be the duty of the courts to declare it invalid, if it depended for its validity upon the power given to Congress to regulate commerce. But, that the subject matter of an act of Congress would have to reach this stage of certainty of non-relationship to commerce to require such an extreme exercise of judicial power, is clear from the statement of Mr. Justice Miller in the Trade Mark Cases:⁶⁹

"* * * the question therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within Congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an act of Congress, or of any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty."

Can it be said in the instant case that it is plain that Congress has transcended its powers in saying that mines and department stores in intrastate commerce, affect interstate commerce? That there is a clear interdependence has been stated before, but cannot be emphasized too heavily. In a word, it must be granted that interstate commerce today is more severely injured than ever before in our history. It is said that various enterprises doing business in one town or even one neighborhood, do not affect interstate commerce. To test the argument, remove the causes of depression affecting these local concerns all over the country, and imagine what would happen to the erstwhile anemic interstate trade of the nation! It cannot be said that if mines

⁶⁹ 100 U. S. 82 (1879).

and department stores and grocery stores all over the land, raise wages, hire more people, and generally raise the national purchasing power—it cannot then be said that interstate commerce would remain prostrate. This is as clear an evidence of cause and effect—of economic interdependence between interstate commerce and intrastate commerce as can be drawn from a complex situation!

Before leaving this point, it is proper to note the case of *Northern Securities Co. v. U. S.*⁷⁰ Here, the Court said that a holding company domiciled in one state, was in interstate commerce, and the Court so held because of the effect this holding company had on one small segment of interstate commerce. It may be questioned whether the decision is any more far fetched than it would be to hold that a department store like Field's, doing business in one state, and filling orders in neighboring states, is in interstate commerce. Surely organizations like the "May" Department Store chain, the various chain furniture stores and shoe stores and suit stores and Piggly Wiggles and the rest, are in interstate commerce and affect the flow of commerce more than this one holding company.

Is it logical to state that all these various types of stores which cut wages, lay off workers and lengthen hours, and order less merchandise, are beyond the scope of Congress in that they do not effect interstate commerce, and is it logical not to allow Congress to relieve the burden when every kind of store indulges in such practices, when the cumulative effect of all this activity strangles commerce—and yet to state that Congress has the power to include within the scope of interstate commerce one combination, such as a holding company of a railway or of a tobacco company, because they restrain the flow of commerce? The effect in either case is the same—business falls off, and as Mr. Chief Justice Hughes said in the *Appalachian Coals* case,

⁷⁰ *Supra* note 9. A corporation was proceeded against by a bill in equity to enforce the provisions of the Sherman anti-trust law. The company was organized by the stockholders of two transcontinental and competing railway companies, as a holding corporation to take the shares held by stockholders of the constituent companies, in exchange for its own shares upon an agreed basis of value, and pursuant to that plan, it became the majority owner of the competing companies. Such an agreement was held to be an illegal combination in restraint of interstate commerce and trade, within the prohibition of the law, and the holding company was restrained from voting such stock or exercising any control over the constituent companies.

"the wells of commerce run dry." The only difference between a monopoly and multitudes of individual stores killing commerce, are differences in the number of owners of each enterprise. There is one other difference. A monopoly kills commerce by closing out all competition. Thousands of competing stores, in a depression, kill business by carrying competition to a killing extreme. In a competitive economic system, there are evils at both extremes, and the Greek philosophic ideal of the Golden Mean is still applicable! Shall we allow Congress to regulate one end to save the middle, and prevent it from doing so at the other end? To so decree, is to lock the front door and leave the back door gaping wide!

If we permit history to say of us, that we achieved national maturity and strength, and economic health under our Constitution, and then became so blinded with what it brought to us, that when a malaise struck us, we continued to worship the instrument of past glories and believed that the Constitution as applied in horse and buggy days could not be applied to keep us strong among automobiles and airplanes, we grant that we have builded a Frankenstein! Or, as the Calistan Packers decision has it, "To adopt the view that the Constitution is static, and that it does not permit Congress from time to time to take such steps as may reasonably be deemed appropriate to the economic preservation of the country, is to insist that the Constitution was created containing the seeds of its own destruction. This court will not subscribe to such a view."

We must recognize that our Constitution is flexible, that our Constitution, written to "form a more perfect union, * * * to insure domestic tranquility, and to promote the general welfare," was made to serve us best in times just such as these! We must recognize the truth of Mr. Justice Cardozo's statements in one of his essays, wherein he stated that the law must be progressive as well as conservative—it must take the best in the past that is adapted to continue to bring us the best in the future.

To cavil, and to quibble, is to ignore the wisdom apparent to a conservative such as Mr. Justice Brewer, who said, in *In Re Debs*,⁷¹ "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the

⁷¹ 158 U. S. 564, 15 Sup. Ct. 900 (1895). *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301 (1908): "The constitutional function of Congress is to save and promote interstate Commerce, and it may save and promote it through suppression of any kind of injurious influence."

habits of life of the people vary with each succeeding generation. * * * Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same, but it operates today upon modes of interstate commerce unknown to the Fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

In conclusion, we must face our national problems not alone from the legalistic point of view, when we seek the sanction of our fundamental law. We must, in our humble way, seek to emulate just a bit of the philosophy and the vision and the liberal outlook of the Fathers, which has made our Constitution live and endure up to the present. To hold otherwise under present circumstances, is to say that our Constitution is just as controlling, but also just as dead, as the dead hand of the common law, which seeks to control airplanes by the same laws that regulated a post-chaise in the days of Blackstone!

We must recognize that Mr. Justice Brandeis indeed blazed a bright trail in his dissent in *New State Ice Co. v. Liebmann*:⁷² "The people of the United States are now confronted with an emergency more serious than war. Misery is widespread, in a time, not of scarcity, but of overabundance. The long continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices, and a volume of economic losses which threatens our financial institutions. There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."

We must not lose sight of the fact that the Constitution was made to serve man, and man was not made to serve the Constitution! Neither the framers of the Constitution, nor the states which ratified it, as Mr. Justice Brandeis concludes, "intended to deprive us of the power to correct evils of technological unemployment and excess productive capacity which have attended progress in the useful arts. To stay experimentation in things social and economic is a grave responsibility." And finally, we must not then be slaves to the formulae which we have made! We must remember that America is a force, not a formula!

⁷² 285 U. S. 262, 52 Sup. Ct. 371 (1932).

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